IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NOS.40 AND 42 OF 2003

CRIMINAL REVISION APPLICATION NO.40 OF 2003

Mr. Roy Fernandes E.
Mascarenhas, resident
of House No.199,
Calata, Majorda,
Salcete, Goa. ... Applicant.

versus

State ... Respondent.

Mr. V. A. Lawande, Advocate for the Applicant.

Mr. S. N. Sardessai, Public Prosecutor for State/Respondent.

CRIMINAL REVISION APPLICATION NO. 42 OF 2003

Mr. Vishal Metha,
Bachelor, 24 years of
age, permanent resident
of F/4, Vasco Towers,
Vasco da Gama, Goa. ... Applicant.

versus

State ... Respondent.

Mr. Arun Bras de Sa, Advocate for the Applicant.

Mrs. Winnie Coutinho, Additional Public Prosecutor for State/Respondent.

CORAM: P. V. HARDAS, J.

DATED: 11TH SEPTEMBER, 2003.

ORAL JUDGMENT

With the consent of the learned Counsel for the parties, these revisions are being decided finally at the stage of Admission. Since, the Applicants are the Accused in the same criminal trial and the facts being identical, both these applications are decided by this common Judgment.

2. These revisions have been filed by the Applicants, who are accused in Crime No.84 of 2003 for an offence punishable under Sections 376(2)(g), 328 r/w Section 34 of the Indian Penal Code against the Judgment of the Ist Additional Sessions Judge, Panaji, dated 19th August, 2003, in Criminal Revision Application No.80 of 2003.

3. By the aforesaid Judgment, which is impugned in the present revisions, the learned Ist Additional Sessions Judge, Panaji, had quashed and set aside the Order of the learned Judicial Magistrate First Class, Panaji dated 21st July, 2003, dismissing an application

dated 18th July, 2003 filed by the Investigating Officer seeking orders of the learned Judicial Magistrate First Class, Panaji for production of the present Applicants/Accused before the Medical Officer of the Goa Medical College, Bambolim for taking blood samples for DNA test.

4. A brief reference to the fact, as are germane for the decision of the present revisions are stated hereunder:-

On 23rd May, 2003, the first informant Mrs. Susan Badyari, wife of Abdul Gani, had lodged a complaint against the present Applicants and four other persons. On the basis of the said complaint, an offence under Section 376(2)(g) r/w Section 34 of the Indian Penal Code came to be registered vide Crime No.84 of 2003. During the course of investigation, the Applicants and the other persons named in the first examination report came to be arrested. During the course of investigation also the blood samples of the present Applicants and the others who were arrested was obtained. On 18th July, 2003, while the present Applicants were in judicial custody, the Investigating Officer filed an application requesting the Court that necessary orders may be issued to the Jailor of the Judicial Lock-up, Panaji for the production of the

Applicants herein before the Medical Officer of the Goa Medical College, Bambolim, for taking blood samples for DNA testing. In the said application, it was also stated that in order to conduct DNA testing, the blood samples of the Applicants was necessary. The learned Judicial Magistrate First Class, Panaji, by his Order dated 21st July, 2003, held that since the Investigating Officer had not produced the statement of the Applicants that they were willing to voluntarily give their blood samples for the purposes of conducting the DNA tests, the Applicants could not be forced or ordered to give their blood samples. The learned Judicial Magistrate First Class, Panaji, placed reliance on the directions issued by the Supreme Court in this behalf.

5. The State being aggrieved by the aforesaid Order of the learned Judicial Magistrate First Class, Panaji, dated 21st July, 2003, filed Criminal Revision Application No.80 of 2003, which was assigned to the Ist Additional Sessions Judge, Panaji, for decision. The learned Ist Additional Sessions Judge, Panaji, by his Judgment dated 19th August, 2003, allowed the Criminal Revision filed by the State and granted the prayer made by the Investigating Officer in the application dated 18th July, 2003 i.e. for passing appropriate orders for the production of the Applicants/Accused before the Medical Practitioner of the Goa Medical College,

Bambolim for taking blood samples of the Accused. The Applicants/Accused being aggrieved by the Order of the Ist Additional Sessions Judge, Panaji, have filed the present Criminal Revision Applications under Section 397 of the Code of Criminal Procedure.

6. The learned Ist Additional Sessions Judge, Panaji, while quashing and setting aside the Order of the learned Judicial Magistrate First Class, Panaji has held that the ratio of the Judgment of the Apex Court in **Sharda** v. **Dharmpal** (2003) 4 SCC 493 would not apply to the investigation which was being carried out by the Investigating Officer. The learned Ist Additional Sessions Judge, Panaji, came to the conclusion that the Division Bench Judgment of the Bombay High Court in **Anil Anantrao Lokhande** v. **The State of Maharashtra** 1981 Cri.L.J. 125 would squarely apply to the facts of the case before him and accordingly allowed the revision.

7. At the out-set, I must express my appreciation to the learned Counsel appearing for the parties for the able assistence rendered to this Court in deciding these revision applications.

8. Mr. Arun Bras de Sa, learned Counsel appearing on behalf of the Applicants in Criminal Revision Application No. 42 of 2003 has urged:

I. The Criminal Revision Application before the learned Ist Additional Sessions Judge, Panaji was rendered infructuous in view of the fact that a provisional charge-sheet had been filed before the learned Judicial Magistrate First Class, Panaji on 19th July, 2003. Thus, according to the learned Counsel appearing on behalf of the Applicant because of the filing of the charge-sheet the application seeking appropriate directions was rendered infructuous.

II. According to the learned Counsel appearing on behalf of the Applicant the words "reasonable grounds for believing" occurring in Section 53 of the Code of Criminal Procedure contemplates the existence of some material for arriving at the conclusion that the examination of the Accused by a Medical Practitioner was necessary. According to the learned Counsel appearing on behalf of the Applicant, the existence of the material or the grounds for believing that an examination of the Accused was necessary ought to have been disclosed in the application dated 18th July, 2003. In support of these submissions, the learned Counsel appearing on behalf of the Applicant has placed reliance on a Judgment of the Supreme Court in **Dr. Partap Singh and another** v. **Director of Enforcement, Foreign Exchange Regulation Act and others** AIR 1985 SC 989 and **Prahlad Singh Bhati** v. **NCT, Delhi and another** (2001) 4 SCC 280.

III. The learned Counsel appearing on behalf of the Applicant has further urged that Section 53 in its fold does not contemplate taking blood samples of an Accused for the purpose of DNA testing. It is submitted by the learned Counsel appearing on behalf of the Applicant that DNA testing was unknown when the statute came to be drafted.

IV. It is also urged by the learned Counsel appearing on behalf of the Applicant that in the absence of existence of any material to justify the passing of an Order directing the Accused to give blood samples in these circumstances would amount to testimonial compulsion within the meaning of Section 20(3) of the Constitution of India.

9. Mr. V. A. Lawande, learned Counsel appearing for the Applicant in Criminal Revision Application No.40 of 2003 has adopted the argument canvassed by Mr. Arun Bras de Sa, learned Counsel appearing for the Applicant in Criminal Revision Application No.42 of 2003.

10. Mrs. Winnie Coutinho, learned Additional Public Prosecutor appearing on behalf of the State in Criminal Revision Application No.42 of 2003 has urged before me that mere filing of the charge-sheet on the subsequent date by the Investigating Officer did not render the Criminal Revision Application before the Ist

Additional Sessions Judge as infructuous. According to the learned Additional Public Prosecutor appearing on behalf of the State, the application dated 18th July, 2003 was filed before the filing of the provisional charge-sheet. The learned Additional Public Prosecutor has further urged that the prosecution had received a letter on 16th July, 2003 from the Director, Central Forensic Science Laboratory, Hyderabad informing the Investigating Officer that the examination of the exhibits was under study and the reports of the same were likely to be ready by the first week of August, 2003. The letter further requested that the two exhibits of the victim girl "F" and "R" are required for DNA examination. The letter, therefore, requested for collection of the said two exhibits for forwarding it to the Director, CFSL, Kolkata for examination. It is also urged before me that by letter dated 25th July, 2003, the Director of Central Forensic Science Laboratory at Kolkata requested for sending of the blood samples of the victims and the suspects with particulars being entered in the prescribed form. It is, therefore, urged by the learned Additional Public Prosecutor that this material forms reasonable grounds for examination of the blood samples of the Accused. Next, it is also submitted by the learned Additional Public Prosecutor that the Code of Criminal Procedure being an on-going statute has to be interpreted to take in its fold also

examination of blood samples for DNA testing. Relying on the Judgment of the Apex Court and of the Division Bench of the Bombay High Court, it is submitted by the learned Public Prosecutor that ordering the Accused to give blood samples under Section 53 does not amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution of India. Mr. S. N. Sardessai, learned Public Prosecutor appearing on behalf of the State in Criminal Revision Application No.40 of 2003 has adopted the above submissions.

11. The prosecution had filed the application on 18th July, 2003 by which the prosecution sought directions from the learned Judicial Magistrate First Class, Panaji for sending the Accused to the Goa Medical College, Bambolim, for taking blood samples of the Applicants/Accused for DNA testing. The offence was registered on 23rd May, 2003 against the present Applicants and four other persons. In that background, particularly with the period of 90 days drawing nearer, the prosecution filed a provisional charge-sheet on 19th July, 2003 against the present Applicants only. Obviously, this charge-sheet was filed during the pendency of the application dated 18th July, 2003. The learned Judicial Magistrate First Class, Panaji, for the reasons recorded by him rejected the said application. The learned Ist Additional Sessions Judge, Panaji for

the reasons set out in his Judgment allowed the application. Merely because a provisional charge-sheet had been filed, the Criminal Revision Applications before the learned Ist Additional Sessions Judge, Panaji, was not rendered infructuous. Section 173(8) of the Code of Criminal Procedure permits further investigation even after filing of the charge-sheet. Admittedly, the application under Section 53 was moved by the prosecution a day prior to the filing of the charge-sheet. Even if it is held that by filing of the charge-sheet the said application before the learned Judicial Magistrate First Class, Panaji, became infructuous, the fact remains that the right of the prosecution to investigate is not affected even after filing of the charge-sheet. Therefore, according to me, the learned Ist Additional Sessions Judge, Panaji was competent to hear the said Criminal Revision Application filed by the State and by filing of the charge-sheet the same was not rendered infructuous.

12. Section 53 of the Code of Criminal Procedure permits the medical examination of a person arrested on the charge of committing an offence if the Police have reasonable grounds for believing that an examination of the person will afford evidence as to the commission of the offence. The words "reasonable grounds for believing" takes in its fold the nature of the offence

and the allegations in respect of the person who is alleged to have committed the offence. Therefore, the nature of the offence and the material justifying the allegations in respect of the commission of the offence forms the "reasonable grounds for believing". The existence of the material, therefore, to justify the examination of an Accused by a Medical Practitioner are the nature of the offence and the material in support of the allegations regarding the commission of the offence. In the present case, the vaginal swabs of the victim girl were obtained by the Medical Practitioner and the same were forwarded to the Central Forensic Science Laboratory for examination. The Director of the Central Forensic Science Laboratory, Hyderabad, by his letter which was received by the Investigating Officer on 16th July, 2003, had opined that those two swabs marked as Exhibits "F" and "R" were required to be examined by the Central Forensic Science Laboratory, Kolkata for DNA examination. Therefore, accordingly, blood samples of both the victim girl as well as the present Applicants was requested for. The presence of semen, if found in the vaginal swabs of the victim girl would be material evidence which would connect the Accused with the crime in question on the basis of the DNA examination of the blood of the victim and the Applicants/Accused. In order to invoke the provisions of Section 53 of the Code of Criminal Procedure, it is not necessary that some

material should be in existence. In other words, it is not necessary that a report of the Chemical Analyser should have been received by the prosecution and in order to further cement or fortify the report of the Chemical Analyser that blood samples of the Accused are required to be obtained. All that Section 53 contemplates is that looking to the nature of the offence and the allegations in respect of the commission of the offence, there are reasonable grounds for believing that an examination of the person of the Accused will afford evidence as to the commission of the offence. In the present case, the letter of the Director of the Central Forensic Science Laboratory, Hyderabad, opining that DNA examination of the exhibits "F" and "R"(vaginal swabs) with the blood samples of the Applicants/Accused was necessary, was according to me, the material on the basis of which the Investigating Officer can be said to have reasonable grounds for believing that the examination of the blood samples of the Accused and the victim girl would afford evidence in respect of the commission of the offence. It is true that generally Section 53 is resorted to at the investigation stage. In the present case also, an application under Section 53 came to be filed before the learned Judicial Magistrate First Class, Panaji, before filing of the charge-sheet.

13. Mr. Arun Bras de Sa, learned Counsel appearing on behalf of the Applicant has relied on a Judgment of the Supreme Court in **Dr. Partap Singh and another** v. **Director of Enforcement, Foreign Exchange Regulation Act and others** (supra) where the Supreme Court in para 10 of the report has held that the expression "reason to believe" is not synonymous with subjective satisfaction of the Officer. The belief must be held in good faith, it cannot be merely a pretence. It was open for the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of this Section. The Apex Court on examining the original papers was satisfied that there was material before the second Respondent there in which would furnish him grounds for entertaining a reasonable belief that some documents which would be useful in the investigation or proceedings under the Foreign Exchange Regulation Act were secreted in the house of the Appellants therein. The Supreme Court, therefore, came to the conclusion that the Respondent therein was fully justified in doing the search.

14. According to me, therefore, there was material before the Investigating Officer on the basis of the letter of the Director of Central Forensic

Science Laboratory, Hyderabad to entertain reasonable grounds for believing that the examination of the blood samples of the Accused would afford evidence as to the commission of the offence alleged against the Applicants/Accused.

15. It is true that Section 53 makes no reference to any DNA tests. However, the Supreme Court in **State of Maharashtra** v. **Dr. Praful B. Desai** 2003 CRI.L.J. 2033 has held that the law is well settled and the doctrine "Contemporanea exposit to est optima et fortissimm" has no application when interpreting a provision of an on-going statute act like the Criminal Procedure Code. Section 53 contemplates not only blood samples being taken but it also contemplates taking samples of hair of the Accused as per the decision of the Allahabad High Court in **Neeraj Sharma** v. **State of U.P.** 1993 CRI.L.J. 2266. The Madras High Court in **Thaniel Victor** v. **State** 1991 CRI.L.J. 2416 has held that examination of a person under Section 53 of the Code of Criminal Procedure cannot only mean what is visible on the body and if necessary would include examination of an internal organ for the purpose contemplated under the said Section.

16. The Division Bench of the Bombay High Court in **Anil Anantrao Lokhande** v. **The State of**

Maharashtra(supra) has held that it was open to the Court which is seized of the matter to issue direction or to grant approval or permission to the police for carrying out further investigation under Section 53 of the Code. The learned Judges of the Division Bench further held that taking of the sample of blood by a registered Medical Practitioner at the request of the Police Officer would not amount to testimonial compulsion or compelling the Accused to be a witness against himself. Similar view is also taken by the learned Judge of the Allahabad High Court in **Neeraj Sharma** v. **State of U.P.**(supra). The learned Judge of the Andhra Pradesh High Court in **Ananth Kumar Naik** v. **The State of Andhra Pradesh**1977 CRI.L.J. 1797 has held that the examination of an Accused under Sections 53 and 54 of the Code of Criminal Procedure forms part of investigation as defined in Section 2(4), subjecting an arrested person to medical examination under Section 2(4) and, therefore, forms part of investigation. The learned Single Judge of this Court in **State of Maharashtra** v. **Ranjit Megharaj Bhillam** 2003 ALL MR(Cri.) 1332 has also held that taking of blood sample of the Accused for comparison is permissible under Section 53 of the Code and thereby the Accused does not become a witness within the meaning of Article 20(3) of the Constitution of India.

17. I have given my anxious consideration to the rival submissions advanced before me and according to me, the learned Ist Additional Sessions Judge, Panaji, did not commit any error in exercise of its jurisdiction in allowing the Appeal and in directing the Accused to give their blood samples for DNA testing. The present revisions are, therefore, devoid of any substance and are dismissed. The Applicants/Accused shall appear before the learned Judicial Magistrate First Class, Panaji, on 19th September, 2003 and shall submit themselves before the Medical Officer, Goa Medical College, Bambolim, for taking blood samples for DNA testing.

P. V. HARDAS, J.

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